STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2006
v	No. 261834 Wayne Circuit Court
JIMMIE LEON GORDON, Defendant-Appellant.	LC No. 04-011268-01

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for his first-degree murder conviction, 17 months to 4 years for each felonious assault conviction, and two years for his felony-firearm conviction. We affirm.

Defendant first argues that the trial court erred in instructing the jury that it could "infer an intent to kill by the use of a dangerous weapon." Defendant argues that the trial court's instruction in this regard created a conclusive presumption of the intent necessary to commit first-degree premeditated murder and, thereby, improperly shifted to him the burden to prove his claim of self-defense and the lack of an intent to kill. We disagree.

Because defendant failed to object to this instruction below, he must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We find no such error in the trial court's charge. The instruction did not, as defendant asserts, direct the jury that defendant was presumed to have possessed the intent to kill, or that it must infer such intent from the fact that defendant used a dangerous weapon. Cf. *People v Woods*, 416 Mich 581, 595-597; 331 NW2d 707 (1982). Rather, consistent with CJI2d 16.21, the instruction merely informed the jury that it "may" infer that defendant acted with an intent to kill from his use of a deadly weapon. See *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995) (recognizing the distinction between mandatory presumptions that unlawfully shift the burden to prove an element of an offense and those that merely "allow . . . the jury to find proof of an element of the crime from proof of a basic fact"). Such instruction is consistent with the law in this state, see *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997), and did not have the effect of shifting the burden of proof. Indeed, the trial court instructed the jury several times that the burden of proof as to both the principal charges and defendant's claim of self-

defense, was with the prosecutor. Defendant has failed to show plain error affecting his substantial rights. *Carines, supra*.

Defendant also argues that the trial court erred in failing to instruct the jury regarding voluntary manslaughter as a lesser included offense of first-degree murder. Because defendant did not request such an instruction at trial, it is again incumbent upon him to demonstrate plain error affecting his substantial rights. *Id*. Defendant has, however, failed to do so.

Defendant correctly asserts that an instruction on the offense of voluntary manslaughter as a necessarily included lesser offense of murder "must be given if supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003); see also *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002). However, in assigning error to the trial court's failure to provide such instruction in this case, defendant argues simply that the "existing record clearly supports instruction on the lesser offense of voluntary manslaughter," as it demonstrates that defendant "may have been acting under the effects of hot blood and passion rather than reasoned thought." Such cursory and conclusive argument is insufficient to properly place this matter before us, let alone establish the plain error required for relief in this matter. *Carines*, *supra*; see also *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (an appellant may not merely announce his position and leave it to this Court to "unravel or elaborate for him his arguments"). In any event, even if the offense of voluntary manslaughter was supported by the facts, "where a defendant is convicted of first-degree murder, and the jury rejects other lesser-included offenses, the failure to instruct on voluntary manslaughter is harmless." *People v Sullivan*, 231 Mich App 510, 520; 586 NW2d 578 (1998). Here, the trial court instructed the jury on the law concerning both first- and second-degree murder. Because the jury rejected the lesser included offense of second-degree murder, any error arising from the trial court's failure to also instruct on voluntary manslaughter was harmless. *Id*.; see also *People v Gillis*, 474 Mich 105, 140 n 18; 712 NW2d 419 (2006).

Next, defendant argues that there was insufficient evidence to support his conviction for first-degree premeditated murder. A challenge to the sufficiency of the evidence for a criminal conviction is reviewed de novo to determine whether, when viewed in the light most favorable to the prosecutor, the evidence presented at trial could lead a rational trier of fact to find that all the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). This standard of review is deferential, and requires a reviewing court to draw all reasonable inferences and resolve credibility conflicts in support of the verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To convict a defendant of first-degree murder, the prosecution must prove that the defendant killed the victim, and that the killing was wilful, deliberate and premeditated. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). To establish premeditation and deliberation, the prosecution must show the existence of a time interval between the initial homicidal intent and the ultimate action long enough to afford a reasonable person the opportunity to take a "second look." *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). In determining whether a defendant acted with premeditation, the trier of fact may consider the defendant's actions before and after the crime and the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. *People v Moorer*, 262 Mich App 64, 77; 683 NW2d 736 (2004).

When viewed in a light most favorable to the prosecution, the evidence presented at trial showed that following a physical confrontation between the victim's sister and defendant's girlfriend, Ebony Jackson, the victim and his mother accompanied his sister to defendant's home to retrieve her purse from a vehicle parked in defendant's driveway. As the trio looked for the purse inside the car, defendant came out of his house and onto the driveway where he remarked, "I know y'all didn't come to my house with this Ebony bullshit." After the victim demanded to know where Ebony was, defendant ran into his house, returned with a rifle, and fired six shots, one of which struck the victim in his back, in the direction of the trio. Upon realizing that the victim had been shot, the victim's mother screamed at defendant, asking him why he shot the rifle, to which defendant replied, "He shouldn't have ran up on me . . . I'm Pac-Man motherfucker," before leaving the scene and throwing the rifle in a trashcan.

Contrary to defendant's assertion, the foregoing evidence was sufficient to support that the killing was both premeditated and deliberate. *Gonzalez, supra*. The totality of circumstances, including defendant's statements before and after the killing, the number of shots fired, the location of the fatal wound, and defendant leaving the scene to dispose of the rifle that he retrieved after first confronting the victim and his family, were such that a reasonable trier of fact could conclude that defendant retained a homicidal intent after a reasonable opportunity to take a "second look." *Id*.; *Moorer, supra*. Although defendant offered testimony to refute the elements of premeditation and deliberation, this Court must give deference to the jury's findings by determining all reasonable inferences and credibility choices in favor of the jury's verdict. *Nowack, supra*. Consequently, we reject defendant's assertion that the evidence was insufficient to support his conviction of first-degree premeditated murder.

Defendant next argues that he was denied his right to effective assistance of counsel. Because no *Ginther*[1] hearing has been conducted, our review of this issue is limited to mistakes that are apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To support a successful claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the results of the proceedings would have been different. *Id*. at 423-424.

In challenging the performance of his counsel, defendant first argues that his counsel was ineffective for failing to call defendant's neighbor, Mechelle Gates, as a witness at trial. We are not persuaded, however, that Gates' testimony that he observed two individuals outside defendant's home with "shining objects" in their hands would have changed the outcome of defendant's trial. Gates' proposed testimony is similar to that of Mark Glover, who testified that while standing in the living room of defendant's home, he peered out a window and observed "two guys" creeping up the driveway. Although Gates' testimony would have provided additional support for defendant's claim that two individuals attacked him outside his home, given that the jury chose not to believe this theory despite the support offered by Glover, we find no basis from which to conclude that there is a reasonable probability that the result of the proceedings would have been different had Gates also been called to testify. *Id*.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant also argues that his counsel was ineffective because he did not request an instruction on voluntary manslaughter and failed to object to the trial court's instruction regarding the intent necessary for first-degree premeditated murder. However, as already discussed, the trial court did not err by instructing the jury that it could infer the intent to kill from defendant's use of a dangerous weapon, and any error in the failure to instruct the jury on the lesser included offense of voluntary manslaughter was harmless. Thus, even if counsel's conduct was deficient, defendant's right to a fair trial was not prejudiced. *Id*.

In a supplemental brief filed in propria persona pursuant to Administrative Order No. 2004-6, Standard 4, defendant also argues that he was denied his right to a fair trial when the prosecutor (1) opened the sequestered witness' room door and allowed the victim's mother and sister to enter and mingle with police officers waiting to testify, and (2) referred to the weapon with which the victim was killed as an "assault rifle." We disagree.

A defendant properly preserves a claim of prosecutorial misconduct by objecting to the alleged impropriety before the trial court. *People v Nantelle*, 236 Mich App 616, 625; 601 NW2d 393 (1999). Here, defendant's attorney objected to the victim's mother and sister being in close proximity to the police officers who had not yet testified. This issue is thus preserved. This Court reviews de novo preserved claims of prosecutorial misconduct to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Defendant's attorney did not, however, object to the prosecutor's use of the phrase "assault rifle." That issue is thus unpreserved. This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial because of the actions of the prosecutor. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court considers issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the prosecutor's conduct in context. *Thomas*, *supra* at 454.

Although it is not disputed that the victim's mother and sister were permitted by the prosecutor to briefly mingle with police officers who had not yet testified, defendant has failed to present any evidence that these individuals discussed the case or their testimony, or had any other conversation that denied defendant a fair trial. Rather, defendant relies solely on the fact that it occurred as evidence of impropriety. Without more, this is not error requiring reversal. See, e.g., *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996) (a defendant who asserts on appeal that a witness violated the trial court's sequestration order must show that the violation resulted in prejudice).

With regard to the prosecutor's use of the phrase "assault rifle" during closing arguments, "[t]he propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id*. Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation and internal quotation marks omitted). They are

given wide latitude and need not confine their arguments to the blandest of all possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Here, although the weapon was not admitted into evidence at trial, defendant referred to the weapon as a "rifle" during his testimony and admitted that he threw it in the trash after the shooting. Officer David Pauch additionally testified that the shell casings found at the scene of the incident were consistent with casings that would be used to house bullets used in a rifle, and Officer David Soli opined that the type of gun that would typically fire a bullet matching the shell casings found at the scene was an "assault rifle." Taken in context, the prosecutor's reference to the weapon used by defendant as an "assault rifle" was a fair inference based on the evidence presented, and thus not plain error requiring reversal. *Rodriguez, supra*.

Finally, defendant argues in his Standard 4 brief that he was denied his right to a fair trial as a result of an "unauthorized communication" with the jury during deliberations. Counsel for defendant first raised this issue at sentencing, when he sought to adjourn the matter pending an evidentiary hearing on this, as well as several other issues argued by counsel to have denied defendant a fair trial. Although declining to delay sentencing for that purpose, the trial court invited counsel to raise those issues in a written motion for a new trial following sentencing. The record on appeal, however, indicates that no such motion was ever filed by defendant or his counsel. This Court's review is limited to the record developed in the trial court, and it is an appellant's obligation to create a sufficient record for our review. See MCR 7.210(A)(1); see also *Petraszewsky v Keeth*, 201 Mich App 535, 540; 506 NW2d 890 (1993) ("the appellant bears the burden of furnishing the reviewing court with a record that verifies the basis of any argument on which reversal or other claim for appellate relief is predicated). Defendant having failed to do so here, we find an insufficient basis for appellate consideration of this issue.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio